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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-16

CHESLEY KARR, a minor, individually and JOHN R. KARR, individually and as next friend and Guardian-Ad-Litem on behalf of themselves and all others similarly situated,

Petitioners,

versus

CLIFFORD SCHMIDT, Principal of Coronado High School, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of Case	2
Reasons for Denying Writ	3
Argument	3
Conclusion And Signatures	11
Certificate of Service	12
APPENDIX: Student Dress Code	1a

AUTHORITIES CITED

Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971)	3
Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969)	3
Dawson v. Hillsborough County School Board, 445 F.2d 308 (1971)	4
Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968).	4, 5
Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971)	5
Gfell v. Rickleman, 441 F.2d 444 (6th Cir. 1971)	5
H. B. Goldsmith et al. v. Quitman Independent School District et al., 461 F.2d 1262 (June 12, 1972)	7
Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970)	5
Karr et al. v. Schmidt et al., 401 U.S. 1201	7

Chapter 1 1

Chapter 2 15

Chapter 3 32

Chapter 4 47

Chapter 5 63

Chapter 6 78

Chapter 7 94

Chapter 8 110

Chapter 9 127

Chapter 10 143

Chapter 11 159

Chapter 12 175

junctive relief, is reported at 320 F.Supp. 728 and is set forth in the Appendix to the Petition for Writ of Certiorari at pp. 1a-17a. The en banc decision of the United States Court of Appeals for the Fifth Circuit is reported in 460 F.2d 609 and is set forth in the Appendix to the Petition for Writ of Certiorari at pp. 29a-64a.

JURISDICTION

The jurisdictional requisites are stated in the Petition.

QUESTIONS PRESENTED

I. Whether there is a constitutionally protected right under the First, Eighth, Ninth, Tenth, and Fourteenth Amendments, to wear one's hair in a public high school in the length and style that suits the wearer.

II. The grooming rules in question having been shown to be reasonable and not arbitrary or capricious, were the trial court's findings to the contrary without support in the evidence, or alternatively, contrary to the preponderance of the evidence?

STATEMENT OF THE CASE

The statement in the Petition is substantially correct, subject to the following additions and corrections:

The evidence in the trial court not only "explored the genesis of the regulation and the purported justifications offered to support it so that the court could determine whether the regulation was 'necessary to alleviate interference with the educational process'" (Petition, p. 3), but also so that the court could determine whether the regulation was reasonable or arbitrary or capricious.

REASONS FOR DENYING WRIT

I. There is no real conflict of decisions between the various Circuit Courts of Appeal.

II. There is no important question of federal law.

III. The decision below is clearly correct.

IV. The question may be moot because the hair regulation about which Petitioners complain has been amended.

ARGUMENT

I

There Is No Real Conflict Of Decisions Between The Various Circuit Courts Of Appeal

Petitioners urge that this Court is obligated to grant certiorari because there is disagreement among the Circuits about whether federal courts should interfere with school regulations that prohibit long hair styles of male students attending public schools.

Although there is an apparent conflict in the decisions of the Circuit Courts cited by Petitioners (Petition, pp. 7-8), a careful review of the decisions of each will disclose no real conflict in the actual judicial pronouncements, but only a differentiation in result by reason of differing fact situations, whereby justification or reasonableness for the hair regulation was not shown by the record to the satisfaction of the particular appellate court.

Each of the "pro-hair" courts which have declared hair regulations invalid, to wit, the First, Third, Fourth, Seventh and Eighth Circuits, cited by Petitioners, held explicitly or implicitly that school authorities failed to carry their burden of justifying the regulation against long hair, or declared such regulation unconstitutional because not related to legitimate school board objectives, as did the Fifth Circuit in one case, *Dawson v. Hillsborough County School Board*, 445 F.2d 308 (1971).

The Fifth (other than in *Dawson*, supra), Sixth, Ninth and Tenth Circuits, on the other hand, have refused to interfere with school regulations that prohibit long hair styles, essentially on the basis that the right to select the length of one's hair is too insubstantial to constitute a right protected by the Federal Constitution, and therefore to warrant federal court consideration; or that justification, reasonableness, and relationship to legitimate school board objectives were shown to the satisfaction of the courts concerned. *Ferrell v. Dallas Independent School District*, 392 F.2d 697

(5th Cir. 1968); *Wood v. Alamo Heights Independent School District*, 433 F.2d 355 (5th Cir. 1970); *Davis v. Firment*, 408 F.2d 1085 (5th Cir. 1969); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970); *Gfell v. Rickleman*, 441 F.2d 444 (6th Cir. 1971); *King v. Saddleback Junior College District*, 445 F.2d 932 (9th Cir. 1971); *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971). This Court denied certiorari in *Ferrell*, 393 U.S. 856, 89 S.Ct. 98, *Jackson*, 400 U.S. 850, 91 S.Ct. 55, and *Freeman*, 405 U.S. ——, 92 S.Ct. 1292.

On the other hand, the Circuit Courts above cited by both Petitioners and Respondents, which have had the "hair" problem to decide are essentially in agreement: (1) that the due process clause of the Fourteenth Amendment establishes a sphere of personal liberty of every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests; and (2) that the wearing of long hair has insufficient communicative content to entitle it to the protection of the First Amendment. (Case at Bar, Petition, App. 37a). In the latter pronouncement the following, sometimes called "pro-hair" Circuit Courts, have similarly ruled on the First Amendment question: *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970) and *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971). The other "pro-hair" Circuit Courts cited as being in conflict by Petitioners, did not have the First Amendment question before them.

Mr. Justice Harlan has stated that "even where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the

conflict may be resolved as a result of future cases in the Courts of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences, as where a statute which has given rise to conflicting interpretations has been repealed or is about to expire. The nub of all these qualifications is that a conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court.". Stern and Gressman, *Supreme Court Practice*, Fourth Edition, p. 155.

Of necessity there must be a case-by-case approach, viewing the issue on the particular facts, circumstances and evidence of each case, and where this case-by-case approach is pursued by the courts, decisions thereon will of necessity be different but not in real conflict with other jurisdictions.

Even the trial court in his Memorandum of Decision stated "all courts have emphasized the necessity for a case-by-case approach, viewing the issue on the particular facts, circumstances and evidence of each case, *and this opinion is so limited.*". (Emphasis added.) (Petition, App. p. 9a, n. 18.)

We cannot agree with Petitioners that the Court below "is as closely split internally as are the Circuits generally." (Petition, p. 9) Since its decision in the instant case, the Court below has upheld a high school hair regulation similar to the instant case in *Southern v. Dallas Independent School District, et al.*, 461 F.2d

1267 (June 16, 1972), in a per curiam opinion; and has also upheld a high school hair regulation in *H. B. Goldsmith et al. v. Quitman Independent School District, et al.*, 461 F.2d 1262 (June 12, 1972), in a per curiam opinion, both such cases mentioning the Karr case at bar.

II

There Is No Important Question Of Federal Law

School boards must be given the widest possible latitude in the management of school affairs. School administrators make and have made innumerable decisions which have been held valid in Texas State Courts, restricting student liberty, such as restrictions requiring students to park automobiles in a designated parking lot and leave them until a designated hour; forbidding students from leaving school grounds during recess and noon hour; prohibiting membership in high school fraternities and sororities; and forbidding students from taking lunch except from the school cafeteria. (Petition, App. p. 42a, nn. 15, 16, 17 and 18).

No better language can be found bearing hereon than that of Mr. Justice Black, when this case was presented to him on Petitioners' Motion to Vacate The Stay of Injunction granted by the Court below, in the instant case. *Karr et al. v. Schmidt et al.*, 91 S.Ct. 592, 401 U.S. 1201. We quote the late Justice as follows:

> "The motion in this case is presented to me in a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as 'Emergency Motion' and 'harassment' and 'irreparable damages'

are calculated to leave the impression that this case over the length of hair has created or is about to create a great national 'crisis'. I confess my inability to understand how anyone would thus classify this hair length case. The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance — the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of in which States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and

state legislatures of all our 50 States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear."

III

The Decision Below Is Clearly Correct

The Court below in *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (1969) cert. denied, 393 U.S. 856, first addressed itself to the "long hair" issue and ruled that a school may lawfully promulgate reasonable grooming rules for their students. That case involved a factual situation closely paralleling the case at bar in that the Plaintiffs were Texas high school students, barred from school by a hair regulation similar to that utilized by the high school in the instant case. In *Ferrell* the Court reserved decision on the question: Is there a constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer? In the case at bar said Court holds that no such right is to be found within the plain meaning of the Constitution. Further, the Court rejects the theories that the First, Eighth, Ninth, Tenth and Fourteenth Amendments, and the penumbras therefrom, supply a basis in the Constitution for such a right.

Chesley Karr brought suit "because, I like my hair long", and the Court below was correct in denying the protection of the First Amendment to one whose hair

style conveys no message, but is simply pleasing to him and his parents.

The asserted right of a high school student to wear hair in school at a length that suits him, not being of fundamental liberty significance, the Court below was correct in refusing to recognize that the right to wear hair at any length is inherent in the liberty of due process assurances of the Fourteenth Amendment, or is protected by the Eighth and Ninth Amendments.

The Court below, with the complete record before it, concluded that the school board showed rationality, justification and reasonableness for its hair length restrictions, and the Court was therefore correct in holding that the district court was clearly in error to conclude otherwise, and in enjoining the enforcement of the restriction.

In support of the foregoing propositions as to the correctness of the decision in the Court below we refer to the above cited cases under I, supra.

IV

The Question May Be Moot

The Board of Trustees of the El Paso Independent School District in August of 1971 amended the Student Dress Code, and the length of hair regulation for boys was changed to read as follows:

> "1. The length of hair shall not exceed shoulder length as long as it does not obstruct vision. Artificial means may be used to conceal hair." (App. infra, p. 3a)

The hair regulation in question no longer being in effect, the question of its constitutional validity would appear to be moot in that its enforcement has no further application to Petitioner, Chesley Karr, or the class for whom he also sought relief. Moreover, he is no longer a high school student, but now attends a university.

However, if it can be said that it has not already been correctly decided whether a school board has the right to enforce hair grooming regulations which are reasonable, rational, justifiable and necessary to the orderly educational processes, and when such restrictions are not arbitrarily or capriciously enacted, then the question is not moot.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondents hereby certifies as follows:

(a) That I am a member of the Bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Brief in Opposition to Petition for Writ of Certiorari.

(b) That the names and post office addresses of each attorney of record for the adverse party are as follows:

Mr. Melvin L. Wulf
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(c) That on this day I served three printed copies of the foregoing Brief in Opposition on each of said attorneys for said Petitioners, by depositing same in the United States Post Office with first class postage prepaid properly addressed to each of said attorneys.

EXECUTED this ____ day of October, 1972.

Harold L. Sims,
Attorney for Respondents

APPENDIX

Student Dress 5370

The matter of student grooming is of utmost concern to parents who realize the importance of seeing that children are properly attired when they leave for school each day. Also, student behavior may be influenced by proper dress and grooming. Consequently, student grooming is also the concern of school administrators and teachers.

In order to help ensure acceptable behavior on the part of the students, it becomes necessary to establish certain guidelines to aid parents and students in selecting suitable attire for the school year. Schools also recognize that parents are basically responsible for their children's dress and general appearance. The role of the school is one of guidance for pupils in an effort for total education and the development of acceptable attitudes; and if a problem should arise concerning the dress code, counseling should be provided.

Student dress and grooming will be considered acceptable if it does not violate any of the three following principles:

1. Clothing worn is not to be suggestive or indecent.
2. Clothing and general appearance is not to be of the type that would cause a disturbance or interfere with the instructional program.

3. Clothing and general appearance is to be such as not to constitute a health or safety hazard.

Guidelines for dress and grooming are:

FOR GIRLS

1. Skirt length should be determined by what is appropriate for sitting and standing.

2. Pant dresses, pantsuits, culottes, jeans, and slacks are acceptable if properly fitted. Cutoffs and shorts are not permissible.

3. Sandals are permissible providing they have a strap around the heels (*for safety reasons*).

4. Dark sunglasses may be worn in the classroom when the doctor's authorization is on file in the nurse's office.

5. *See-through blouses*, bare midriff blouses, or low-cut dresses and blouses are not permitted.

6. Sweat shirts and T-shirts, of the sleeveless type, are not to be worn as an outside garment. Shirts and jackets with advertising, slogans, pictures, and/or numbers are not permitted unless specifically authorized by the principal of each individual school.

FOR BOYS

1. The length of hair shall not exceed shoulder length as long as it does not obstruct vision. Artificial means may be used to conceal hair.

2. Sideburns may extend to the bottom of the jawbone *and may be flared,* but must be neatly trimmed.

3. Mustaches or beards are not acceptable, and students are to be clean shaven at all times.

4. Sweat shirts and T-shirts, of the sleeveless type, are not to be worn as an outside garment. Shirts and jackets with advertising, slogans, pictures, and/or numbers are not permitted unless specifically authorized by the principal of each individual school.
5. Medallions, brooches, necklaces, earrings and chains are not to be worn unless approved by the principal.

6. Socks are to be worn with shoes but are optional with sandals.

7. Trousers must be properly fitted; a belt is not required. Bermuda shorts are acceptable, but cutoffs and shorts (other than Bermuda shorts) are prohibited.

8. Shoes with taps, hobnailed boots, or thongs are not to be worn.

9. Dark sunglasses may be worn in the classroom when the doctor's authorization is on file in the nurse's office.

Cleanliness of body and clothing is expected of all students at all times.

No child shall be admitted to school or shall be allowed to continue in school who fails to conform to the proper standards of dress.*

Failure to comply with the rules of dress and grooming shall be grounds for suspension.

Amended May, 1969; July, 1970; August, 1971

A true copy of the original, I certify.
/s/ D. H. WIGGS
President, Board of Trustees of the
El Paso Independent School District

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*Sections 23.26 and 21.301 of the Texas Education Code)